STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

THE VILLAGE OF LINCOLN, a Michigan municipal corporation,

Plaintiff/Appellee,

v

VIKING ENERGY OF LINCOLN, INC.,

Defendant/Appellant.

Michigan Supreme Court No: 127144
Court of Appeals Docket No: 246319
Lower Court Case No. 00-10619-CE(K)

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PLAINTIFF/APPELLEE VILLAGE OF LINCOLN'S SUPPLEMENTAL BRIEF TO THE MICHIGAN SUPREME COURT PURSUANT TO THE MICHIGAN SUPREME COURT'S ORDER DATED OCTOBER 6, 2005

PROOF OF SERVICE

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I. STATEMENT OF QUESTIONS PRESENTED BY THE MICHIGAN SUPREME COURT THROUGH ITS ORDER DATED OCTOBER 6, 2005

I. WHETHER THE ISSUE OF THE ORDINANCE ENACTMENT IS NOW MOOT?

II. WHETHER THE DOCTRINE OF JACKSON V. THOMPSON-MCCULLY CO, LLC, 239 MICH APP 482 (2000) PROVIDES MEANINGFUL STANDARDS FOR CONSISTENT APPLICATION?

III. WHETHER THE DEFENDANT ABANDONED ITS PROCEDURAL CHALLENGE TO THE ORDINANCE BY FAILING TO FIRST RAISE A CHALLENGE PURSUANT TO MCL 125.585(11)?

II. PROCEDURAL FACTS

On October 6, 2005, this Michigan Supreme Court issued an Order indicating that, pursuant to MCR 7.302(G)(1), the Clerk of the Michigan Supreme Court will schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1).

> "On order of the Court, the application for leave to appeal the August 24, 2004 judgment of the Court of Appeals is considered and , pursuant to MCR 7.302(G)(1), we direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1)." (**Exhibit 1** -- Order Dated October 6, 2005)

This Order also states that the parties are to file supplemental briefs on three (3) issues:

> "The parties shall file supplemental briefs within 28 days of the date of this order, and are directed to include among the issues briefed: (1) is the issue of whether the ordinance was properly enacted moot; (2) does the doctrine of Jackson v Thompson-McCully Co, LLC, 239 Mich. App 482 (2000), lack meaningful standards for consistent application and is it consistent with the City and Village Zoning Act, MCL 125.581 et seq; and (3) has defendant Viking Energy abandoned the procedural challenge to the ordinance by failing to raise it pursuant to MCL 125.585(11)." (**Exhibit 1** -- Order Dated October 6, 2005)

This serves as the Defendants supplemental brief under the October 6, 2005 Order.

III. LEGAL ARGUMENTS

A. Issue #1 --- Whether the Issue of The Ordinance Enactment is Now Moot.

1. The Issue of Whether Sections #3-5 of Ordinance 96-2 Were Properly Enacted is Moot.

The issue of whether Sections # 3-5 of Plaintiff's Ordinance 96-2 was properly enacted is moot. As this Michigan Supreme Court knows, it only decides actual cases and controversies.

> "**The principal duty of this Court is to decide actual cases and controversies.** *Anway v. Grand Rapids R Co,* 211 Mich. 592, 610, 179 N.W. 350 (1920)." (**Federated Publications Inc**. v. **City of Lansing**, 467 Mich. 98; 649 NW2d 383 (2002).) (Emphasis Added)

In order to fulfill this duty, this Michigan Supreme Court does not reach moot questions that have no practical legal effect. This applies here.

> "To that end, **this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect** in the case before us unless the issue is one of public significance that is likely to recur, yet evade judicial review." (**Federated Publications Inc**. v. **City of Lansing**, 467 Mich. 98; 649 NW2d 383 (2002).) (Emphasis Added)

A moot case is a case which seeks to get a judgment on a pretend controversy where there is no controversy **or** a case where a party seeks to get a decision in advance of a right being asserted or contested:

> "'As otherwise defined a **moot case is a case which seeks to get a judgment on a pretended controversy when in reality there is none**, or to get a decision in advance about a right before it has been actually asserted or contested, * * *.' See Johnson v. City of Muskegon Heights (1951), 330 Mich. 631, 48 N.W.2d 194." (**People** v **Davis**, 29 Mich. App. 443, 467; 185 NW2d 609 (1971).) (Emphasis Added)

If there is no controversy, the relief sought is an advisory opinion. As this Michigan Supreme Court knows, it does not issue advisory opinions because advisory opinions are nonbinding and represent an unconstitutional exercise of power: [1]

> "It is undeniable, therefore, that the proper exercise **of "judicial power" by this Court must involve a decision that is *binding* and not merely *advisory*. A nonbinding decision issued by this Court would be an unconstitutional exercise of power**." (**In Re Certified Questions from US Court of Appeals**, 472 Mich. 1225; 696 NW2d 687(2005).) (Emphasis Added)

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[1] If an issue is unnecessary to the resolution of an appeal then a court shall not render an advisory opinion:

> "It is **unnecessary** to add to the length of this **opinion** by discussing other questions raised on this **appeal**, since the one we have determined is decisive of the entire matter." (**City of Negaunee** v. **State Tax Commission**, 337 Mich. 169, 177; 59 NW2d 136 (1953).)

Here, the Plaintiff brought suit to enforce section 6 of zoning ordinance 96-2. The Plaintiff's complaint expressly provides as follows:

> "16 That the Plaintiff's Ordinance No. 96-2, at Section 6, reads as follows:
>
> Section 6. Major emitting facilities which have been validly authorized to combust solid waste or solid waste fuel by a competent State authority as of the effective date of this Ordinance may continue to combust solid waste or solid waste fuel only to the extent authorized by the effective date of this Ordinance. Such combustion is hereby declared to be a non-conforming use under this Ordinance.
>
> 17 That the operations of Viking Energy at the Facility is a non-conforming use under the Plaintiff's Ordinance.
>
> 18 That under Ordinance No. 96-2, the Facility must limit its burning activities to shoes activities authorized by law as of February 3, 1997." (**Exhibit 2** -- Plaintiff's Complaint at Paragraphs 16-18.)

The Defendant confirmed in its Application for Leave to Appeal to this Michigan Supreme Court that the Plaintiffs complaint was specific to Section 6 of Ordinance 96-2 – and no other provision:

> " After Viking began burning a different mixture as authorized by the State permit in the summer of 2000, the **Village filed a Complaint** in the Circuit Court of Alcona County in which it contended that Viking was in violation of **Section 6 of Ordinance 96-2 regulating fuel mixture**." (**Exhibit 3** -- Defendants Application for Leave to Appeal at p. 1.) (Emphasis Added)

The trial court granted the defendants motion for summary disposition and the Plaintiff appealed. The Court of Appeals, after its review of the record, confirmed that the Plaintiff brought suit only to enforce section 6 of Ordinance 96-2.

> "Plaintiff appeals as of right from the trial court's grant of summary disposition for defendant under MCR 2.116(C)(10) in an action brought by plaintiff to enforce section six of zoning ordinance 96-2." (**Village of Lincoln** v. **Viking Energy of Lincoln, Inc.**, unpublished opinion per

curiam of the Court of Appeals, decided [August 24, 2004] (Docket No. 246319).)

The Court of Appeals ruled that the trial court did not err in concluding that section 6 of Ordinance 96-2 violated the Defendants' right to substantive due process. The Plaintiff has not taken issue with that decision.

> However, the trial court did not err in concluding that section six of ordinance 96-2 violates this defendant's right to substantive due process. Plaintiff's argument that section six is rationally related to the government interest in protecting citizens from dust and odors is unpersuasive. . . . Because plaintiff did not present evidence contrary to that offered by defendant to demonstrate the reasonableness of section six or its relationship to the public health, safety, and welfare, plaintiff's claim must fail." (**Village of Lincoln** v. **Viking Energy of Lincoln, Inc.**, unpublished opinion per curiam of the Court of Appeals, decided [August 24, 2004] (Docket No. 246319).)
>
> "We affirm the trial court's judgment that section six of ordinance 96-2 as applied violates defendant's substantive due process rights." (**Village of Lincoln** v. **Viking Energy of Lincoln, Inc.**, unpublished opinion per curiam of the Court of Appeals, decided [August 24, 2004] (Docket No. 246319).)

The Michigan Court of Appeals noted that it did not know why the Trial Court ruled on Sections 3-5 of Ordinance 96-2. **This is because the Plaintiff did not bring suit to enforce these Ordinances**:[2]

> "FN2. We are uncertain why the trial court ruled on any section other than section six. Ordinance 96-2 has a severability clause (section seven), and as noted, plaintiff's verified complaint only sought enforcement of section six." ." (**Village of Lincoln** v. **Viking Energy of Lincoln, Inc.**,

[2] However, the Court of Appeals did rule that the trial court erred in finding sections three, four and five unconstitutional.

> "Accordingly, the trial court erred in finding sections three, four and five of the ordinance unconstitutional." (**Village of Lincoln** v. **Viking Energy of Lincoln, Inc.**, unpublished opinion per curiam of the Court of Appeals, decided [August 24, 2004] (Docket No. 246319).)

unpublished opinion per curiam of the Court of Appeals, decided [August 24, 2004] (Docket No. 246319).)

As stated above, the Plaintiff's complaint only sought enforcement of section 6 of Ordinance 96-2 which prohibits the increase of combustion of solid waste beyond that authorized by the State as of the effective date of the Ordinance.

> "Section 6. Major emitting facilities which have been validly authorized to combust solid waste or solid waste fuel by a competent State authority as of the effective date of this Ordinance may continue to combust solid waste or solid waste fuel only to the extent authorized by the effective date of this Ordinance. Such combustion is hereby declared to be a non-conforming use under this Ordinance." (**Exhibit 4** -- Section 6 of Ordinance 96-2)

The Plaintiff did not seek enforcement of Sections 3-5 of Ordinance 96-2. Section 3 of Ordinance 96-2 provides for a setback which prohibits the combustion of solid waste fuel within 1,000 feet of an occupied residential dwelling, school, day care center, hospital or clinic, church or nursing home:

> "Section 3. No major emitting facility shall combust solid waste or solid waste fuel within 1,000 feet of an occupied residential dwelling, school, day care center, hospital or clinic, church, or nursing home." (**Exhibit 4** -- Ordinance 96-2 at section 3)

Section 4 of Ordinance 96-2 provides for a setback related to the storage of solid waste fuel.

> "Section 4. No solid waste storage pile or solid waste fuel stockpile at a major emitting facility shall be located within 1,000 feet of an occupied residential dwelling, school, day care center, hospital or clinic, church, or nursing home." (**Exhibit 4** -- Ordinance 96-2 at section 4.)

Finally, section 5 of Ordinance 96-2 provides that a solid waste fuel stockpile shall be located on a concrete surface and shall not exceed 40 feet in height.

> "Section 5. A solid waste storage or solid waste fuel stockpile at a major emitting facility shall be located on a concrete surface or other surface suitable to prevent infiltration of groundwater by rainwater runoff or leachate from the solid waste pile. No solid waste storage pile or solid

> waste fuel stockpile shall exceed 40 feet in height." (Section 5 of Ordinance 96-2)

Nowhere in the Plaintiff's complaint did the Plaintiff allege that the Defendant was an emitting facility combusting solid waste within 1,000 feet of an occupied residential dwelling, school , day care center or hospital in violation of Ordinance 96-2 Section 3. Nowhere in the complaint did the Plaintiff allege that the Defendant was violating Section 4 of Ordinance 96-2 by storing solid waste fuel within 1,000 feet of an occupied residential dwelling, school, day care center or hospital. Finally, nowhere in the complaint did the Plaintiff allege that the Defendant was violating section 5 of Ordinance 96-2 by storing solid waste fuel on something other than a concrete surface.

In fact, the Defendant -- in its Application for Leave to Appeal to this Michigan Supreme Court -- admits openly that the Plaintiff did not seek to enforce its setback of either the plant or the fuel pile.

> "The Village has not attempted to regulate the setback of either the plant or the fuel pile." (**Exhibit 3** -- Defendants Application for Leave to Appeal at p. 11.)

There is no question that, the Plaintiff did not seek to enforce Sections 3-5 of Ordinance 96-2. There is no real case or controversy with regard to the application or enforcement of sections 3-5 of Ordinance 96-2. While the Defendant may fear that the Plaintiff may seek to enforce Sections 3-5 of Ordinance 96-2 in the future, **no controversy exists today**. As a result, whether the Plaintiff's Ordinance was properly enacted at Sections 3-5 of Ordinance 96-2 is moot.

2. **The Issue of Whether Section 6 of Ordinance 96-2 Was Properly Enacted is Also Moot.**

The issue of whether Section 6 of Ordinance 96-2 was properly enacted is also moot. As this Michigan Supreme Court knows, the Michigan Court of Appeals affirmed the Trial Court's ruling that Section 6 of Ordinance 96-2 is unconstitutional.

> "However, the **trial court did not err in concluding that section six of ordinance 96-2 violates this defendant's right to substantive due process**. Plaintiff's argument that section six is rationally related to the government interest in protecting citizens from dust and odors is unpersuasive." (**Village of Lincoln** v. **Viking Energy of Lincoln, Inc.**, unpublished opinion per curiam of the Court of Appeals, decided [August 24, 2004] (Docket No. 246319).) (Emphasis Added)

There is no need to now examine whether Section 6 of Ordinance 96-2 was properly enacted since the Trial Court and the Court of Appeals have already struck it down as unconstitutional. As this Michigan Supreme Court knows, it does not render advisory opinions on issues unnecessary to the resolution of an appeal.

> "It is **unnecessary** to add to the length of this **opinion** by discussing other questions raised on this **appeal**, since the one we have determined is decisive of the entire matter." (**City of Negaunee** v. **State Tax Commission**, 337 Mich. 169, 177; 59 NW2d 136 (1953).)

Since Section 6 of Ordinance 96-2 has been struck down as unconstitutional, it is unnecessary to determine whether Section 6 of Ordinance 96-2 is properly enacted. The issue is moot.[3]

B. **Issue #2 – Whether The Doctrine of Jackson v Thompson-McCully Co, LLC, 239 Mich. App 482 (2000) Lacks Meaningful Standards for Consistent Application and is Consistent with the City and Village Zoning Act**.

The doctrine of **Jackson** v **Thompson-McCully Co, LLC**, 239 Mich. App. 482; 608 NW2d 531 (2000) provides for a meaningful standard which allows for consistent application.

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[3] It is also important to note that this is not an issue which is likely to recur. Sections 3-5 of Ordinance 96-2 are specific and limited to major emitting facilities and solid waste storage piles. Consequently, the likelihood of other individuals throughout this state bringing actions to challenge the enactment of Sections 3-5 of Ordinance 96-2 is remote.

The Michigan Court of Appeals, in **Jackson** v. **Thompson-McCully Co, LLC**, 239 Mich. App. 482; 608 NW2d 531 (2000), ruled that if a zoning ordinance is not challenged until several years after its enactment then a challenge on the ground that the ordinance was improperly enacted will be precluded on public policy grounds.

> "**Where a zoning ordinance is not challenged until several years after its enactment, a challenge on the ground that the ordinance was improperly enacted is precluded on public policy grounds.** Richmond Twp. v. Erbes, 195 Mich.App. 210, 217, 489 N.W.2d 504 (1992); Northville Area Non-Profit Housing Corp. v. Walled Lake, 43 Mich.App. 424, 434-435, 204 N.W.2d 274 (1972). **The rezonings in this case occurred in 1987 and 1988. Plaintiffs did not challenge the rezonings until nearly ten years later when they filed the instant action in March 1998. During this period, township officials and residents acted in accordance with the rezonings.** The 1987 rezoning included not only the Blackman asphalt plant site, but also property for a post office distribution center. **The general public and those buying and *494 selling real estate must be able to rely on the adoption of zoning amendments that remain unchallenged for a period of years.** Id. at 435-436, 204 N.W.2d 274." (**Jackson** v. **Thompson-McCully Co.**, LLC 239 Mich. App. 482; 608 NW2d 531 (2000).) (Emphasis Added)

As a general rule, this Michigan Supreme Court is concerned with guaranteeing that common law rules are created that provide for "certainty" and "predictability" in the law.

> "Among this Court's prime concerns must be the obligation to create common law rules that create ***91*** certainty and predictability in the law."(**Ritchie-Gamester** v. **City of Berkley**, 461 Mich. 73, 90-91; 597 NW2d 517 (1999).)

In order to accomplish this objective, common law standards must lend themselves to easy, common-sense application:

> "We believe that the standard we adopt is consistent with our existing jurisprudence and lends itself to easy, common-sense application. On the other hand, the concurrence offers a bowdlerization of our traditional negligence ***526*** standard that we believe would be exceedingly difficult to apply." (**Ritchie-Gamester** v. **City of Berkley**, 461 Mich. 73, 90-91; 597 NW2d 517 (1999).)

1. **The Jackson Doctrine Lends Itself to Easy Common Sense Application.**

As stated above, the Court of Appeals in **Jackson** ruled that where a zoning ordinance is not challenged until several years after its enactment, a challenge on the grounds that the ordinance was improperly enacted is precluded on public policy grounds:[4] This doctrine lends itself to an easy common sense application. Pursuant to the **Jackson** doctrine, there is no need to weigh a myriad of complicated factors that would allow for inconsistent application and create an exceedingly difficult test. Instead, a court must merely look at the following:

1 Is there a challenge to a zoning ordinance on the basis of enactment;

2 When was the challenged zoning ordinance enacted; and

3 When was the challenge made.

If there is a challenge to a zoning ordinance on the basis of its enactment and that challenge was made more than several years after its enactment, then that challenge is barred on public policy grounds. This is a simple three prong test which is easy for any court to apply.

2. **This Michigan Supreme Court's Ruling in Ritchie Supports a Conclusion That the Jackson Doctrine Provides for Meaningful and Consistent Application.**

In **Ritchie**, this Michigan Supreme Court ruled that co-participants in a recreational activity owe each other a duty not to act "recklessly".

> "**For the reasons set forth above, we conclude that coparticipants in a recreational activity owe each other a duty not to act recklessly**. Because the trial court properly concluded that plaintiff could not show that **defendant violated this standard, summary disposition was proper**. Thus, we reverse the Court of Appeals decision and reinstate the

[4] Black's law dictionary defines the term "several" to mean more than two.

> "several, adj. 1. (Of a person, place, or thing) more than one or two but not a lot." (Blacks Law Dictionary)

grant of summary disposition for defendant."(**Ritchie**, 461 Mich. At p. 95.)

This Michigan Supreme Court ruled that this is a good standard for liability in recreational activities because "Recklessness" is a term which is susceptible to a common sense understanding and application. This Michigan Supreme Court goes on to note that the "Recklessness" standard comports with the common-sense understanding that participants in recreational activities bring with them.

> "Consequently, **we believe that the line of liability for recreational activities should be drawn at recklessness. Recklessness is a term with a recognized legal meaning and, more importantly, is a term susceptible of a common-sense understanding and application by judges**, attorneys, and jurors alike in the myriad recreational activities that might become the backdrop of litigation. Just as important, **our standard more nearly comports with the common-sense understanding that participants in these activities bring to *95 them**. While the concurrence may disagree whether we have accurately assessed participant expectations, **we think that our standard has the significant value of providing an explicit, easy to apply rule of jurisprudence**. The concurrence has failed to present a sounder, clearer alternative standard." (**Ritchie**, 461 Mich. At p. 95.)

Much like the term "Recklessness" was susceptible to a common sense understanding and application in **Ritchie**, the term "several years" in **Jackson** is a term which is susceptible to a common sense understanding and application. In fact, the Plaintiff would argue that most people have a better understanding of what "several years" means then what "Recklessness" means. Quite simply, under the **Jackson** doctrine if an individual waits "several years" to challenge an ordinance on the basis it was improperly enacted then that challenge will be barred based on public policy grounds.

Furthermore, the **Jackson** standard -- like the standard in **Ritchie** -- comports with the commonsense understanding that people bring with them. Here, landowners will expect that an ordinance governing their land was properly enacted if that Ordinance has been enacted for

several years. These landowners will rely upon that ordinance and will not search old records to make sure that the Ordinance was properly enacted and violate the ordinance reserving enactment problems as a defense.

3. The Jackson Doctrine is Grounded in Good Sense.

As stated above, the **Jackson** Doctrine is meaningful and will be consistent in its application. More importantly, the test is grounded in good sense. Within the **Jackson** Opinion, the Michigan Court of Appeals supports its doctrine on the basis that the general public must be able to rely on the adoption of zoning amendments that remain unchallenged for a number of years. Specifically, the Michigan Court of Appeals in its **Jackson** Opinion cited to Richmond Twp. v. Erbes, 195 Mich. App. 210, 217, 489 N.W.2d 504 (1992) and Northville Area Non-Profit Housing Corp. v. Walled Lake, 43 Mich. App. 424, 434-435, 204 N.W.2d 274 (1972). The **Northville** case dates back to 1972. In **Northville**, the defendant attempted to invalidate an ordinance on the grounds that it was not enacted properly due to an alleged failure of an official to publish notice of hearing on a proposed amendment.

> "We are confronted with the anomalous situation of a government agency claiming a zoning amendment, adopted by it, is invalid because ***426** of the alleged failure of one of its officials to perform a statutory duty, namely, publish notice of hearing on the proposed amendment. Plaintiff appeals as of right from the trial court's decision ruling the zoning ordinance invalid." (**Northville**, 43 Mich. App. at p. 426.)

> "The defendants predicate their position on their claim that the city clerk had failed to publish the notice of hearing before the Council at which the amendment was adopted." (**Northville**, 43 Mich. App. at p. 432.)

The Court of Appeals found in **Northville** that it would be against public policy to strike an adopted zoning ordinance amendment on the claim that a public official failed to perform a duty where a period of approximately four years had elapsed.

> "We come to the same conclusion--that it would be contrary to public policy to permit a municipality to strike its apparently properly adopted

> zoning ordinance amendment on the claim that a public official failed to perform that duty which the law imposes upon her. This we would hold as a matter of Public policy under any circumstances, and the more so where a period of approximately four years elapsed between the time the amendment was adopted and the city's attempted declaration of invalidity as in this case." (**Northville**, 43 Mich. App. at p. 435.)

The Michigan Court of Appeals ruled that in order to protect the orderly processing of real estate, it is essential that the members of the general public be able to rely on the validity of the public record without the necessity of pouring over musty files and newspaper clippings to avoid a claim that there was a failure to comply with some technical requirement.

> "In the orderly process of handling real estate transactions where they are affected by provisions of zoning ordinances and amendments, it is essential that the members of the general public and the people buying or selling real estate must be able to rely on the validity of the public record, to-wit: a zoning ordinance and the zoning map issued in accordance with such zoning ordinance, without the necessity of poring over musty files and searching newspaper morgues, going back years in order to avoid a claim by other persons that there was a failure to comply with some technical requirement of law in the adoption of the ordinance in question. To hold otherwise would bring about chaotic conditions beyond all comprehension in the transfer ***436*** and usage of real estate in any community having a zoning ordinance affecting such land." (**Northville**, 43 Mich. App. at p. 435)

The Court of Appeals is absolutely correct. There would be chaos if the public had to be concerned that zoning ordinances could be challenged years after their enactment. It would be impractical to require the public to research historic documents on microfilm to ensure that all zoning ordinance were properly noticed.

4. **The Jackson v. Thompson-McCully Doctrine is Consistent with the City and Village Zoning Act.**

The **Jackson** doctrine is consistent with the City and Village Zoning Act. The City and Village Zoning Act is an act to provide for the establishment in cities and villages of zones within which the use of land and structures will be regulated by ordinance. (See: 1994 PA No.

25) Pursuant to MCL 125.581, a legislative body of a city or village may regulate the use of land and structures. Thus, the City and Village Zoning Act places individuals on notice that legislative bodies of a city or village will be regulating the use of land and structures through the use of ordinances. This fact will further cement an individual's belief that if an ordinance has been in existence for several years, **that the Ordinance was properly enacted**. The City and Village Zoning Act actually fosters reliance on ordinances which have been enacted for several years. Thus, the **Jackson** Doctrine dovetails with the City and Village Zoning Act and is not in conflict with it.

C. **Issue #3 – Whether the Defendant Abandoned the Procedural Challenge to the Ordinance by Failing to Raise it Pursuant to MCL 125.585(11).**

The Defendant abandoned its procedural challenge to the Ordinance by failing to raise it pursuant to the City and Village Zoning Act at MCL 125.585(11).

1. **The City and Village Zoning Act Authorizes A Legislative Body of a City or Village To Regulate and Restrict the Use of Land and Structures to Promote Public, Health, Safety and Welfare.**

The preamble to the City and Village Act contained at PA 1994, No 25 provides as follows:

> "**An act to provide for the establishment in cities and villages of districts or zones within which the use of land and structures, the height, the area, the size, and location of buildings may be regulated by ordinance**, and within which districts regulations shall be established for the light and ventilation of those buildings, and within which districts or zones the density of population may be regulated by ordinance; to designate the use of certain state licensed residential facilities; to provide by ordinance for the acquisition by purchase, condemnation, or otherwise of private property which does not conform to the regulations and restrictions of the various zones or districts provided; **to provide for the administering of this act**; to provide for amendments, supplements, or changes hereto; to provide for conflict with the state housing code or other acts, ordinances, or regulations; and to provide penalties for the violation of the terms of this act," being section 125.587 of the Michigan Compiled Laws." (PA 1994, No 25) (Emphasis Added)

MCL 125.581 provides that the legislative body of a city or village may regulate and restrict the use of land and structures to promote public, health, safety and welfare:

> "Sec. 1. (1) The legislative body of a city or village may regulate and restrict the use of land and structures; to meet the needs of the state's residents for food, fiber, energy and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population and transportation systems and other public facilities; to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility needs; **and to promote public health, safety, and welfare,** and for those purposes may divide a city or village into districts of the number, shape, and area considered best suited to carry out this section. For each of those districts regulations may be imposed designating the uses for which buildings or structures shall or shall not be erected or altered, and designating the trades, industries, and other land uses or activities that shall be permitted or excluded or subjected to special regulations." (MCL 125.581) (Emphasis Added)

Here, the Plaintiff enacted Section 3 of Ordinance 96-2 to promote public health, safety and welfare by providing a setback which prohibits the combustion of solid waste fuel within 1,000 feet of an occupied residential dwelling, school, day care center, hospital or clinic, church or nursing home:

> "Section 3. No major emitting facility shall combust solid waste or solid waste fuel within 1,000 feet of an occupied residential dwelling, school, day care center, hospital or clinic, church, or nursing home." (**Exhibit 4** -- Ordinance 96-2 at section 3)

Similarly, the Plaintiff enacted Section 4 of Ordinance 96-2 to promote public health, safety and welfare by providing a setback related to the storage of solid waste fuel.

> "Section 4. No solid waste storage pile or solid waste fuel stockpile at a major emitting facility shall be located within 1,000 feet of an occupied residential dwelling, school, day care center, hospital or clinic, church, or nursing home." (**Exhibit 4** -- Ordinance 96-2 at section 4.)

Finally, the Plaintiff enacted section 5 of Ordinance 96-2 to promote public health, safety and welfare by providing that a solid waste fuel stockpile shall be located on a concrete surface and shall not exceed 40 feet in height.

> "Section 5. A solid waste storage or solid waste fuel stockpile at a major emitting facility shall be located on a concrete surface or other surface suitable to prevent infiltration of groundwater by rainwater runoff or leachate from the solid waste pile. No solid waste storage pile or solid waste fuel stockpile shall exceed 40 feet in height." (Section 5 of Ordinance 96-2) **(Exhibit 4)**

2. **The City and Village Zoning Act Provides for Its Own Manner of Being Administered**.

PA 1994, No 25 states that the City and Village Zoning Act provides for its own manner of being administered.

> "An act . . . **to provide for the administering of this act**; to provide for amendments, supplements, or changes hereto; to provide for conflict with the state housing code or other acts, ordinances, or regulations; and to provide penalties for the violation of the terms of this act," being section 125.587 of the Michigan Compiled Laws." (PA 1994, No 25)

Specifically, the City and Village Zoning Act at MCL 125.585 (11) provides that a person having a decision affected by a zoning ordinance may appeal to the circuit court. Upon appeal, the circuit court shall review the record to ensure that the decision complies with the constitution and laws of this state, is based upon proper procedure, is supported by competent material and substantial evidence on the record and represents the reasonable exercise of discretion granted by law:

> "(11) The decision of the board of appeals is final. However, **a person having an interest affected by the zoning ordinance may appeal to the circuit court**. Upon appeal, the circuit court shall review the record and decision of the board of appeals to ensure that the decision meets all of the following requirements:
>
> (a) Complies with the constitution and laws of this state.

(b) Is based upon proper procedure.

(c) Is supported by competent, material, and substantial evidence on the record.

(d) Represents the reasonable exercise of discretion granted by law to the board of appeals." **(MCL 125.585(11).)**

The Michigan Court of Appeals agrees that the statutes governing zoning decisions anticipate that final decisions made by a zoning board of appeals may then be appealed to the circuit court:

> "The statutes governing zoning decisions anticipate that final decisions are made by the zoning board of appeals, which decisions may then be appealed to circuit court. M.C.L. § 125.585(11); M.S.A. § 5.2935(11)." (**Krohn** v. **City of Saginaw**, 175 Mich. App. 193, 195; 437 NW2d 260 (1989).)

Here, if the Defendant was truly concerned that the setback provisions or fuel storage provisions covered by Sections 3-5 of Ordinance 96-2 could affect the Defendant, then the Defendant could have sought a variance. If the Defendant was unhappy with the result of that variance proceeding, the Defendant could then appeal that result to the circuit court as a matter of right. The Circuit Court, pursuant to MCL 125.585(11), would then review the ruling under the standards contained in MCL 125.585(11). Here, none of this happened. The Defendant failed to raise any procedural challenge to Sections 3-5 of Ordinance 96-2 pursuant to MCL 125.585(11).

Here, the Defendant is concerned that at some time in the "future" the Plaintiff may choose to enforce the setback provisions and fuel storage provisions contained in Sections 3 -5 of Ordinance 96-2 against the Defendant. As a result, the Defendant is seeking this Michigan Supreme Court to render a prospective opinion on a controversy that does not yet exist but may exist in the future. As this Court knows, it does not render such advisory opinions. Consequently, the Defendant's Application for Leave to Appeal must be denied.

IV. CONCLUSIONS AND RELIEF REQUESTED

In addition to the arguments raised in this Brief, the Plaintiff wants to inform this Michigan Supreme Court of a recent development. On September 23, 2005, the MDEQ issued a letter of violation to the Defendant. This letter of violation states as follows:

> "On August 17, 2005, the Department of Environmental Quality (DEQ), Air Quality Division (AQD), conducted a complaint inspection regarding your facility located at 509 West State Street, Lincoln, Michigan. The purpose of this inspection was to determine your facility's compliance with the requirements of the federal Clean Air Act; Part 55, Air Pollution Control, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (Act 451) and to investigate a recent complaint which we received on August 16, 2005, regarding black fallout attributed to your company's operations." (**Exhibit** 5 -- MDEQ Ltr. dated 9-23-05)

The letter of violation goes on to indicate that the inspection of the fallout demonstrated fly ash.

> "During the inspection, samples of the fallout were collected and sent to a lab for microscopic analysis. Based upon the microscopic analysis results (enclosed with this letter) the following air pollution violation was identified:
> Fly ash was found in most collected fallout samples at the highest concentration. It is believed that the source of fly ash that was collected in the City of Lincoln is from Viking Energy." (**Exhibit** 5-- MDEQ ltr. dated 9-23-05)

The letter then referenced Rule 901 and indicated that the Defendant should immediately initiate necessary actions to correct the violation.

> "A person shall not cause or permit the emission of an air contaminant in quantities that cause injurious effect to human health, property, or the unreasonable interference with the comfortable enjoyment of life and property." (**Rule 901**)
>
> "You should immediately initiate necessary actions to correct the cited violation. Additionally, please submit a report of your program for compliance with Rule 901 by October 14, 2005. At a minimum, this report should explain the causes and duration of the violation, whether the violation is ongoing, remedial action taken, and what steps are being taken to prevent a reoccurrence. If the violation is not resolved by the date of your response, describe what equipment you will install, procedures you will implement, processes or process equipment you will shutdown, or

other actions you will take and by what dates these actions will take place." (**Exhibit** 5 -- MDEQ ltr. dated 9-23-05)

WHEREFORE, the Plaintiff/Appellee respectfully requests that this Honorable Michigan Supreme Court:

I. Enter an Order denying the Defendant/Appellant's Application for Leave to Appeal ; and

II. Enter an Order granting such other relief in favor of the Plaintiff/Appellee as this Michigan Supreme Court deems just equitable and appropriate.

Respectfully submitted,

O'REILLY, RANCILIO, P.C.

By: Robert C. Davis
Robert Charles Davis (P40155)
Attorney for Plaintiff/Appellee

Dated: November 2, 2005

PROOF OF SERVICE

I served **Plaintiff/Appellee Village of Lincoln's Supplemental Brief** upon the attorneys of record and/or parties in this case on **November 2, 2005**. I declare the foregoing statement to be true to the best of my information, knowledge and belief.

✗ **U.S. Mail**	☐ Fax
☐ Hand Delivered	☐ Messenger
☐ Express Mail Private	☐ Other:

Elaine Michling